

## STATEMENT OF THE CASE

ISSUES

Claimant argues that the evidence revealed that she met with personal injury by accident that arose out of and in the course of her employment with respondent on November 26, 2002, and each and every working day thereafter through January 3, 2003. She further argues that she is entitled to an award of permanent partial disability compensation based on her 100 percent wage loss and 34 percent task loss, for a 67 percent work disability, or a 24 percent permanent partial impairment to the body as a whole based on the rating of Dr. Glenn Amundsen; to future and unauthorized medical; to temporary total disability compensation for the period of January 3, 2003, through October 16, 2003; and for the payment of past medical expenses. Claimant also argues for a 100 percent task loss due to pain. She is not, however, alleging a permanent total disability. Claimant further argues that she had been guaranteed \$1,800 in wages and that the owner of respondent testified that an employee in her route could expect to be paid \$1,500 to \$2,000 per month. Therefore, she argues her average weekly wage should be computed to be \$461.54 based on the \$2,000 per month expectation.

Respondent requests that the Award of the ALJ be affirmed because the evidence showed that claimant did not suffer a compensable injury. Further, respondent contends that claimant's attempt to claim a series of accidents is not supported by the evidence; that notice was not timely; that claimant did not suffer permanent impairment as a result of a work injury; and that claimant's testimony concerning her average weekly wage was not credible.

The issues for the Board's review are:

(1) Did claimant's alleged accident and injuries arise out of and in the course of her employment with respondent?

(2) Did claimant sustain injury from a single accident on November 26, 2002, and/or in a series of accidents through January 3, 2003?

(3) Did claimant give respondent timely notice of her alleged accident?

(4) What is the nature and extent of claimant's disability?

(5) What was claimant's average weekly wage?

(6) Is claimant entitled to future and unauthorized medical?

(7) Is claimant entitled to temporary total disability benefits for the period of January 3, 2003, through October 16, 2003?

(8) Is claimant entitled to reimbursement for her medical expenses?

FINDINGS OF FACT

In August 2002, claimant began working for Reser's Fine Foods (Reser's) as a tortilla packer. She quit work at Reser's in September 2002 because of the low pay and because it was manual labor. She said that while working at Reser's, she had sore muscles but was never treated for any conditions, nor did she report any workers compensation injuries from working there. Her muscle soreness resolved itself without her having to go to a doctor.

Claimant began working for respondent on November 7, 2002. She was hired by Richard Billinger as a district sales manager and sold first aid and training equipment. On November 26, 2002, claimant alleges that she was making a delivery of gloves to the Topeka Capital-Journal. She said she was moving boxes in the back of the van getting things organized when she experienced severe pain in her left thigh. She drove herself to the emergency room of St. Francis Health Center (St. Francis). Claimant testified that this was within an hour of noticing the leg pain. She had been noticing discomfort for less than 48 hours before she moved the boxes on November 26. She had some mild discomfort in her lower back, but the severe pain she was concerned with was in her left thigh.

At the emergency room, claimant was not seen by a doctor but, instead, was seen by a nurse practitioner. She alleges that she was not given a diagnosis or reason for her leg pain. But she was given a prescription for muscle relaxers and maybe a shot and was told to go to her doctor. Because she had been treated at the Marian Clinic previously, she went there immediately after leaving the emergency room. When she got to the Marian Clinic, she had to make an appointment to see a doctor, but the clinic did fill her prescription.

Claimant testified she called respondent two times on November 26, 2002, once from the emergency room and once after she returned home after getting her prescription filled at the Marian Clinic. She said that she told Mr. Billinger that she had hurt her leg in the back of the van. However, claimant's supervisor at respondent, Mr. Billinger, testified that claimant never told him that she had injured herself working for respondent moving product around in the van. Rather, on November 26, 2002, claimant called him and said she woke up and her leg was hurting, so she was going to go to the doctor. She did not say she was working for respondent when the leg problem occurred. He documented the conversation in a memo written contemporaneously with his conversation with claimant. Claimant also called in on November 27. Mr. Billinger also documented that conversation. Claimant told him she was off work that day because her leg hurt. She told him she had problems before with arthritis and inflammation of the joints and had treatment when she was in Albuquerque, New Mexico.

Susan Rettig and Lisa Knight, respondent's employees who also spoke with claimant on the phone on November 26, 2002, testified that claimant did not mention that she had hurt her leg while working in the back of her van.

It is noted that this case was before the Board previously on an appeal from the ALJ's May 21, 2003, preliminary hearing order in which the ALJ found that claimant had failed to prove accidental injury arising out of and in the course of her employment with respondent and further failed to prove that she provided timely notice of accident to respondent. Based upon the record presented at that time, a single Board Member affirmed the preliminary hearing Order of the ALJ, finding:

Neither the medical evidence nor the testimony of the various respondent representatives supports claimant's contentions that she suffered an accidental injury while employed with respondent. The Board finds most damaging the total lack of comment in the medical reports of any work-related connection to her alleged pain.<sup>1</sup>

In none of the medical reports and records from November 2002 to February 2003 did claimant reference an injury to her back from moving boxes around in a van while working for respondent. In fact, the medical records indicate she was, instead, claiming a back injury with an onset in August 2002 when she performed heavy lifting when working for Reser's. Many of the medical records indicate that she suffered no injury. The registration intake form of November 26, 2002, indicates claimant said she had no injury. The triage nurse stated that claimant complained of left leg pain that started several days ago and that she denied injury. The primary nurse assessment stated that claimant reported labor intensive work in August and that she had pain in her back and pelvis intermittently. Judy Stevens, ARNP, treated claimant on November 26, 2002. The history she took is that claimant reported "ongoing low back pain from an incident in August where she did repetitive heavy lifting. Has had no resolution and presents for that reason. Has been treating herself with Tylenol, which has not been effective."<sup>2</sup> On January 21, 2003, the outpatient rehabilitation clinic at St. Francis shows claimant gave a date of injury onset as August 15, 2002. On another line on the form where claimant could circle "work injury," "car accident," "injury at home," "sports injury," or "other," claimant circled "other."<sup>3</sup> The therapist's notes of the same date list August 2002 heavy lifting as the date of injury. In an emergency room record of January 23, 2003, the history taken indicates: "Hurt back in August – denies any other trauma."<sup>4</sup> In an emergency room visit on January 29, 2003, the registration form indicates claimant's chief complaint was left leg pain and indicates that claimant stated there was no injury. The physician's note from January 29, 2003, states that claimant was treated for left sided sciatica in August 2002. On February 6,

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<sup>1</sup> *Christy v. Fastpro International*, Docket No. 1,009,572, 2003 WL 21962913 (Kan. WCAB July 25, 2003).

<sup>2</sup> Area Depo., Ex. 1 at 36.

<sup>3</sup> Delgado Depo., Ex. 3 at 1.

<sup>4</sup> Area Depo., Ex. 1 at 25.

2003, an MRI report of the lumbar spine listed low back pain with left hip and left leg numbness with a history of lifting heavy objects in August 2002. An addendum dated February 25, 2003, indicates that claimant called and stated she gave the MRI staff incorrect information on the MRI interview. "His notes show 'HX of lifting heavy object 8/02.' Per patient, she meant to say December 2002."<sup>5</sup> In an emergency room report of February 10, 2003, claimant's chief complaint is listed as leg pain with no known injury. Later, the report of Dr. Florin Nicolae, who had given claimant a lumbar epidural steroid injection, indicates claimant presented for left lower extremity pain, paresthesias and weakness, which started in August 2002.

In addition, none of the records from the Marian Clinic mention a work-related injury or that claimant mentioned injuring her back or leg while moving boxes in a van. On December 27, 2002, when claimant was treated at the Marian Clinic by Dr. Martha Ann Socolofsky, claimant said she had done some heavy lifting in August, and the pain was not improving.

Claimant admits telling the emergency room personnel that she did not have an accident because she could not think of anything she did to her leg. Although her leg hurt badly, she did not shut her leg in a door or anything. She claims the person at St. Francis taking the information from her asked if she had ever had back pain, and she indicated she had some in August. She denies telling the emergency room personnel at St. Francis that she had ongoing low back pain from an incident in August where she did heavy repetitive lifting. Claimant denies telling the person that she had been treating herself with Tylenol, but it had not been effective. Claimant states the August pain was muscle soreness, and it went away. Claimant does not know why she wrote August 15 as the date of onset on the outpatient rehabilitation clinic form on January 21, 2003, or why she circled "other." But at that point, she had not had the MRI and did not know what was going on.

Claimant is also claiming injuries to her neck and upper back. She said she first mentioned her neck injury sometime after November 26, 2002. However, although she said she had a weird sensation in her leg in the van on November 26, she now states she should have said she had a weird sensation in her spine, meaning her neck and low back. But the thing that hurt and scared her at the time was her leg. She is not claiming she had neck pain when she went to the emergency room on November 26, but her neck started bothering her later and got progressively worse.

Dr. Sergio Delgado, a board certified orthopedic surgeon, examined claimant on May 13, 2003, at the request of respondent, to give an opinion regarding causation of claimant's injuries. Claimant told Dr. Delgado that while she worked for respondent she had to spend time standing, bending, stooping and twisting and believed she developed back pain with radiation of pain into the leg from those activities. Dr. Delgado examined

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<sup>5</sup> Geist Depo., Ex. 5 at 4.

claimant and reviewed tests and diagnostic studies. As a result, he diagnosed claimant with a disc herniation at L5-S1. He believed claimant was a candidate for surgery.

Although claimant told Dr. Delgado in May 2003 that her problems stemmed from activity at respondent on November 26, 2002, in reviewing her medical records he likewise found some inconsistencies regarding the dates of alleged injuries. There were comments in the records that claimant may have injured her back at Reser's. After reviewing the records, conducting the physical examination, and taking a history from claimant, Dr. Delgado opined that claimant's injury date pre-dated the alleged injury date at respondent.

Dr. Delgado was asked to review the following nurse's note of November 26, 2002.

Reports labor intensive work in Aug. Has had pain in back & pelvis intermittently since now [word unknown] radiates to lower L leg Doing heavy lifting.<sup>6</sup>

Dr. Delgado said that standing alone, it would appear that the left leg pain was something new as of November 26, 2002. The note, however, does not say anything about claimant being hurt at respondent or about an injury getting in and out of a van. Claimant told Dr. Delgado that she spent a lot of time standing, bending, stooping and twisting, but did not say anything about heavy lifting.

Dr. Glenn Amundsen, a board certified orthopedic surgeon, examined claimant on February 23, 2005, at the request of claimant's attorney. Although Dr. Amundsen found it unusual that the emergency room records do not mention the specific mechanism of injury and there was no reference to the injury of November 26, 2002, the fact that claimant went to the emergency room on November 26 supported her claim of injury on that date. He acknowledged the physical examination done at St. Francis indicated claimant was in no acute distress, neurological findings were essentially normal, and she had normal range of motion. He agreed that was not consistent with someone who had a herniated disc with all the full blown symptoms.

When Dr. Amundsen met with claimant, she did not tell him she had an injury in August 2002, even though he would have asked her about preexisting injuries or back condition. If there was documentation that indicated claimant had suffered an injury in August 2002 that had resulted in radiculopathy, that would make a difference in his causation opinion. Dr. Amundsen agreed that when filling out a medical history form for rehabilitation services, claimant listed a date of accident of August 15, 2002. He agreed that the date of August 15, 2002, is inconsistent with the date of accident claimant reported to him. Dr. Amundsen agreed that a medical report dated January 29, 2003, reports a history that claimant had been treated for left side sciatica in August 2002.

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<sup>6</sup> Delgado Depo., Ex. 3 at 4.

Dr. Amundsen testified that relying on claimant's history and his review of her medical records, he believed that claimant injured her neck, or her neck became symptomatic, on November 26, 2002. At the Marian Clinic on January 17, 2003, claimant was complaining of both arms going numb, which Dr. Amundsen said would be compatible with a neck injury. However, there are other conditions that could cause that problem, such as peripheral nerve involvement. Claimant complained of numbness in her arms on January 23, 2002. She complained of numbness in her face on January 29, 2003, which would be consistent with upper back or neck symptoms. However, Dr. Amundsen also stated that if claimant first mentioned a problem with numbness in her arms or face approximately two months after November 26, it would not be consistent with the injury to the neck occurring on November 26, 2002.

Dr. Michael Geist practices emergency medicine, urgent care medicine, and occupational medicine. He examined claimant on October 16, 2007, at the request of respondent. He reviewed claimant's medical records, took a history from her, and performed a physical examination. Claimant told him that while working she twisted in a strange way while lifting boxes, injuring her neck and back.

It was Dr. Geist's opinion that claimant did not suffer injury to her neck and back on November 26, 2002. He found too many discrepancies in the medical records that indicated that her symptoms pre-dated that date. He especially found it significant that none of the medical records from November 2002 to February 2003 mentioned an injury to her back from moving boxes around in a van.

Dr. Geist noted that in the Marian Clinic records of January 17, 2003, claimant complains of both arms being numb, which can frequently be a symptom of a neck injury. But neither that record nor the Marian Clinic record of December 27, 2002, indicate that claimant referenced any neck pain. Dr. Geist did not think claimant's complaints of numbness on her face would be related to symptoms of her neck, saying that normally one does not see numbness in the face with a disc problem in the neck.

Concerning claimant's emergency room visit of January 23, 2003, claimant mentioned bands of numbness in her arms. She also complained that her entire head, back, tongue, arms and feet were numb and tingling. A physical examination was conducted of claimant's neck in which it was noted she had no pain, stiffness or swelling of the neck. With these complaints, Dr. Geist found nothing that would make him think those symptoms were coming from the neck. He found significant the fact that claimant had no pain or stiffness in the neck. Claimant's symptoms made him think of neurological issues, not the neck.

#### **PRINCIPLES OF LAW**

K.S.A. 2007 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the

credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

K.S.A. 2007 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.<sup>7</sup> Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.<sup>8</sup>

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.<sup>9</sup>

### **ANALYSIS AND CONCLUSION**

Where there is conflicting testimony, as in this case, credibility of the witnesses is important. Here, the ALJ had the opportunity to personally observe the claimant and respondent's representatives testify in person. In denying claimant's request for workers compensation benefits, the ALJ apparently believed their testimony over the claimant's testimony. In his Award, the ALJ said: "The claimant is one of the least credible witnesses to ever appear before this Court, and the Court finds her testimony to be riddled with confusion, misunderstandings, and outright fabrications."<sup>10</sup> The Board concludes that

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<sup>7</sup> K.S.A. 2007 Supp. 44-501(a).

<sup>8</sup> *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

<sup>9</sup> *Id.* at 278.

<sup>10</sup> ALJ Award (Jan. 10, 2008) at 4.



some deference may be given to the ALJ's findings and conclusions regarding credibility where he was able to judge the witnesses' credibility by personally observing them testify.

Claimant would have us believe that she reported to her employer on November 26, 2002, and in subsequent conversations, that she was hurt while working in the company van, but yet she failed to mention this important detail to any of the medical personnel she saw on the date of her accident and during the several weeks thereafter. Claimant argues both that her symptoms were only in her leg on November 26, 2002, and that she hurt both her leg and back, and later her neck. And although she admits being asked about and discussing a prior back injury with the nurses at the emergency room, claimant denies making any connection between her leg symptoms and her back. Claimant points to this lack of connection to explain her denial of any accident or injury on November 26, 2002. She cannot explain why the St. Francis medical records of November 26, 2002, also contain a history of leg pain for "several days." Respondent's witnesses are consistent in their initial belief that claimant's problem only involved her leg and was due to a personal or preexisting condition. Richard Billinger, Susan Rettig, Lisa Knight, and Virgil Meinholdt all testified that it was their understanding, until February 2003, that claimant's condition was not related to her job activities with respondent.

There are other inaccuracies in the contemporaneous records that lead the Board to question claimant's candor. For example, she told the hospital that she was unemployed on November 26, 2002. Even as late as January 2003, claimant was reporting that her symptoms did not result from an accident or injury. Yet in February 2003, she called St. Francis to "correct" her history from lifting heavy objects in August 2002 to December 2002. The many questions and inconsistencies lead the Board to conclude that claimant has not met her burden of proving she suffered personal injury by an accident or accidents arising out of and in the course of her employment with respondent. Because of this finding and conclusion, the remaining issues are rendered moot.

### **AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bryce D. Benedict dated January 10, 2008, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of April, 2008.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Beth Regier Foerster, Attorney for Claimant  
Ronald J. Laskowski, Attorney for Respondent and its Insurance Carrier  
Bryce D. Benedict, Administrative Law Judge